

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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**In The Matter of**

**Performance Measurements and Standards for  
Interstate Special Access Services**

**CC Docket No. 01-321**

**Petition of US West, Inc. for a Declaratory Ruling  
Preempting State Commission Proceedings to  
Regulate US West=s Provision Of Federally Tariffed  
Interstate Services**

**CC Docket No. 00-51**

**Petition of Association of Local Telecommunications  
Services for Declaratory Ruling**

**CC Docket Nos. 98-147  
96-98, 98-141**

**Implementation of the Non-Accounting Safeguards of  
Of Section 271 and 272 of The Communications  
Act of 1934, As Amended**

**CC Docket No. 96-149**

**2000 Biennial Regulatory Review-Telecommunications  
Service Quality Reporting Requirements**

**CC Docket No. 00-229**

**AT&T Corp. Petition to Establish Performance  
Standards, Reporting Requirements, and Self-  
Executing Remedies Needed to Ensure Compliance  
By ILECs with Their Statutory Obligations  
Regarding Special Access Services**

**RM 10329**

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**COMMENTS OF  
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (AASCENT@),<sup>1</sup> through undersigned counsel and pursuant to Section 1.415 of the Commission=s Rules, 47 C.F.R. ' 1.415, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 01-339,

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<sup>1</sup> ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of

released November 19, 2001, in the captioned proceedings (*ANPRM*). In the *NPRM*, the Commission seeks comment on whether it should adopt a select group of performance measurements and standards for evaluating incumbent local exchange carrier (*Incumbent LEC*) performance in the provisioning of special access services.<sup>2</sup> ASCENT concurs with the assessment that provisioning of special access services by incumbent LECs is far too often characterized by delay, poor quality and discrimination,<sup>3</sup> the Association's interexchange carrier (*AIXCs*), as well as its competitive local exchange carrier (*Competitive LEC*), members having registered continuing, and increasing, complaints regarding the deterioration of incumbent LEC performance in this critical service area. ASCENT strongly believes that adoption of national measurements and standards for incumbent LEC provision of special access service would assist the Commission in addressing this serious problem. Accordingly, ASCENT supports the Commission's initiatives here and offers the following comments regarding the form, implementation and enforcement of such measurements and standards and associated reporting procedures.

**I.     There is a Compelling Need for Commission  
Action to Address Incumbent LEC Provision  
Of Special Access Services**

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telecommunications and information services.

<sup>2</sup>     NPRM at ¶ 1.

<sup>3</sup>     Id.

As the Commission has recognized, A[s]pecial access services are important in that they are used to connect an end user with a competitive LEC=s or interexchange carrier=s point of presence.<sup>4</sup> Special access services are an essential input to IXC=s provision of interexchange service, used by carriers to connect directly with end users, as well as incumbent LEC switching centers. Special access is also critical to the provision of service by facilities-based competitive LECs who far too often are compelled to secure loop/transport combinations through incumbent LEC special access tariffs, particularly when confronted with incumbent LEC claims of facilities unavailability or incumbent LEC refusals to combine network elements.<sup>5</sup>

Because in most instances incumbent LEC facilities are still the only means for IXCs and competitive LECs alike to connect to end user premises, ASCENT=s IXC and competitive LEC members remain heavily reliant upon incumbent LEC special access services. Facilities availability from alternative sources remains spotty at best, and substantial network construction is not an alternative for the smaller competitors that comprise ASCENT=s rank and file. As the Commission recognized in the *Third Report and Order* in CC Docket No. 96-98, A[n]either self-provisioning interoffice transport facilities nor obtaining these facilities from third-party sources is an adequate alternative to the ubiquitous transmission facilities that a competitor can obtain from the incumbent LEC,<sup>6</sup> and that the same analysis, the Commission further acknowledged, holds true for high capacity loops, as well.<sup>6</sup>

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<sup>4</sup> Id.

<sup>5</sup> ASCENT=s competitive LEC members report that while incumbent LECs generally refuse to provide unbundled network elements (AUNES@) where facilities are not available, they will readily build special access facilities, although obviously not at total element long run incremental costs (ATELRIC@) and without comparable levels of regulatory oversight.

<sup>6</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Third Report and Order), 15 FCC Rcd. 3696, && 181, 332 (1999) (*subsequent history omitted*).

The continued validity of this assessment is borne out by recent findings of the New York Public Service Commission (NYPSC). In a decision issued less than a year ago, the NYPSC concluded that even in Southern/Midtown Manhattan B generally acknowledged to be the most competitive local exchange/exchange access market in the Nation -- the incumbent LEC remains the dominant provider of high-speed facilities.<sup>7</sup> Thus, for example, the NYPSC found that Verizon had fiber or copper facilities present in virtually all of the over 220,000 mixed use, commercial, or public institutions in New York City, while competitors had brought fiber to a maximum of 900' such premises.<sup>8</sup> And outside of New York City, the NYPSC found that Verizon still controlled 88 percent of the market.<sup>9</sup> Accordingly, the NYPSC concluded that Verizon continues to occupy the dominant position in the Special Services market and by its dominance is a controlling factor in the market.<sup>10</sup>

Given the dominant position that incumbent LECs continue to occupy in the special access market, the continued deterioration of provisioning performance has had serious adverse implications for both IXC and competitive LECs. While incumbent LEC special access provisioning has never been stellar, ASCENT IXC and competitive LEC members report that it has reached new lows in recent years. And as in-region, interLATA authority is granted in a growing number of States, and the incentives to discriminate increase as a result, it is highly likely that performance will deteriorate further absent prompt Commission action.

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<sup>7</sup> Proceeding on Motion of the Commission to Investigate Methods to Improve and Maintain High Quality Special Services Performance by Verizon New York Inc./Proceeding on Motion of the Commission to Investigate Performance-Based Incentive Regulatory Plans for New York Telephone Company, Case Nos. 00-C-2051, 92 - C - 0665, Opinion No. 01-1, pp. 6 - 10 (NYPSC June 15, 2001).

<sup>8</sup> Id. at pp. 7 - 8.

<sup>9</sup> Id. at p. 7.

<sup>10</sup> Id. at p. 9. ASpecial services, as that term is used by the NYPSC, are known as special access= when provided pursuant to federal tariffs. Id. at p. 1.

Incumbent LECs blatantly favor retail customers over competitive carriers in provisioning special access circuits, although service quality is often questionable even on the retail side. As described by the NYPSC, Verizon's provision of Special Services is below the threshold of acceptable quality.<sup>11</sup> Confirming this assessment, ASCENT's IXC and competitive LEC members regularly register complaints regarding unmet installation commitments, untimely Firm Order Confirmations (AFOCs), unacceptable provisioning intervals, delayed repair and service restoration, and excessive network outages. Exacerbating these failings, incumbent LECs, in the words of the NYPSC, treat[] other carriers less favorably than . . . [their] retail customers in provisioning special access services.<sup>12</sup> All of which has led the NYPSC to conclude that Verizon provides special wholesale services in a discriminatory manner.<sup>13</sup>

Poor and deteriorating special access service provisioning adversely impacts the ability of IXCs and competitive LECs to serve their customers. Far too often, the resultant service problems are attributed by end users to the IXC and/or competitive LEC. As a result, again as described by the NYPSC, facilities-based competition is hindered.<sup>14</sup>

## **II. The Commission has Jurisdiction to Adopt National Performance Measurements and Standards for Incumbent LEC Special Access Services**

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<sup>11</sup> Id. at p. 5.

<sup>12</sup> Id. at pp. 5 - 6, 9 - 10.

<sup>13</sup> Id. at p. 6.

<sup>14</sup> Id. at p. 9 - 10.

ASCENT submits that the Commission has ample statutory authority to support the adoption, implementation and enforcement of national performance measurements and standards for incumbent LEC special access services. As the *NPRM* notes, the Commission has authority under Section 201(b) and 202(a) of the Communications Act of 1934, as amended (the *Act*), 47 U.S.C. ' ' 201(b), 202(a), to address unjust, unreasonable and discriminatory practices of common carriers, and, again as recognized by the *NPRM*, this authority extends to the provision of special access services.<sup>15</sup> Special access performance measurements and standards can reasonably be expected to assist the Commission in identifying and preventing unjust, unreasonable and discriminatory practices in fulfillment of these statutory mandates.

The authority of the Commission to address deteriorating and discriminatory incumbent LEC provisioning of special access services is bolstered by Sections 4(i) of the Act, 47 U.S.C. ' 154(i), and certainly not undercut by Section 251 of the Act, 47 U.S.C. ' 251. Section 4(i) empowers the Commission to Aperform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.@<sup>16</sup> Section 4(i) thus Asuppl[ies] the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute,@<sup>17</sup> and to this end Aauthorizes . . . [it] to take any actions . . . [it] consider[s] >necessary and proper= to further the public

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<sup>15</sup> NPRM at & 8.

<sup>16</sup> Section 214(c) of the Act further authorizes the Commission to Aattach to the issuance of . . . [a] certificate such terms and conditions as in its judgement the public convenience and necessity may require. 47 U.S.C. ' 214(c).

<sup>17</sup> Iowa Util. Bd v. FCC, 120 F.3d 753, 795 (1997), *aff=d in part, rev=d in part, and remanded sub nom. AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999).

interest in the regulation of telecommunications.<sup>18</sup> Section 251(c), 47 U.S.C. § 251(c), reinforces the Commission's authority to take such actions as it deems necessary to promote local telecommunications competition, and Section 251(g), 47 U.S.C. § 251(g), confirms the continuing importance of exchange access in a competitive telecommunications environment. Congress's imposition of a more stringent non-discrimination standard on incumbent LEC local interconnection obligations does not limit the actions the Commission may take to address discriminatory provision of special access services by incumbent LECs.

### **III. Enforcement Mechanisms Should Both Deter Through Penalties and Compensate Through Self-Executing Remedies**

Enforcement is key to the effectiveness of whatever special access performance measurements and standards the Commission may adopt. An effective enforcement mechanism should achieve two critical goals. Enforcement should deter future violations and compensate entities harmed by past conduct, roughly to the extent of the damages they have suffered. Both elements should be triggered by violation of Abright-line requirements, with the latter being self-executing, in order to be effective.

In order to achieve the requisite deterrent effect, penalties imposed for violations must exceed the benefit to the carrier of the violative conduct. Given the limited deterrent effect of fines heretofore imposed on incumbent LECs for failing to comply with requirements upon which in-region, interLATA entry has been conditioned, or to satisfy conditions associated with Commission approval of mergers, ASCENT submits that monetary forfeitures should be set at

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<sup>18</sup> Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (Second Report and Order and Memorandum Opinion and Order), 11 FCC Rcd. 19392, & 92 (1996) (*subsequent history omitted*). Courts have long held that the Commission's judgment regarding how the public interest is best served is entitled to substantial judicial deference. FCC v. WNCN Listeners Guild, 450 U.S. 582, 596 (1981).

statutory maximums. Such penalties must be imposed swiftly and regularly, if violative conduct is to be deterred. Neither the amount of the potential penalty nor the nature of the conduct which will trigger it should be characterized by any ambiguity. If an incumbent LEC fails to satisfy specified performance standards within a given time frame, the penalty should be automatic.

The compensation component of the enforcement mechanism should be no less defined or automatic. In the event an incumbent LEC fails to satisfy specified performance standards, liquidated damages should be paid to the impacted carriers. The nature and extent of the violative conduct, as well as the formula by which the liquidated damages are to be calculated, should be predetermined. Payments should be made directly to the impacted carriers, with notice of the time and amount of the payment provided to the Commission. Self-executing enforcement mechanisms have the twin benefits of more effective deterrence and more meaningful compensation, both of which elements are lacking in the Commission's complaint process, which is too easily gamed by incumbent LECs to delay, and often avoid, compensatory payments. Such mechanisms could be imposed through the Commission's prescription authority under Section 205 of the Act, 47 U.S.C. ' 205, as part of this rulemaking proceeding.<sup>19</sup>

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<sup>19</sup> Local Exchange Carriers= Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport (Second Report and Order), 12 FCC Rcd. 18,730, & 55 (1997) (*subsequent history omitted*).



#### **IV. Performance Measurements and Standards Proposed by WorldCom Should be Adopted**

ASCENT endorses the performance measurements and standards proposed by WorldCom, Inc. (AWorldCom@) in its *ex parte* submission filed in CC Docket No. 96-98 on August 6, 2001.<sup>20</sup> In that submission, WorldCom proposes eight core measures associated with ordering and provisioning of incumbent LEC special access services, and three key measures associated with maintenance and repair of such services. The former group measures the interval between delivery of access service requests (AASR@) and return of firm order confirmation (AFOC@), tracks ASRs for which FOCs have not been timely received, identifies the percentage of instances in which FOC and requested due dates coincide and in which installations are completed in a timely fashion, measures installation intervals and delays, tracks past due installations, and captures the rate of trouble reports. The latter group measures circuit outages, tracks timeliness of service restoration, and identifies the percentage of recurrant circuit outages. The thresholds proposed by WorldCom for each of these measurements should be readily achievable by incumbent LECs and should allow as well for an acceptable level of service provision by IXC's and competitive LECs. WorldCom's proposed calculation methodologies, business rules and exclusions are all well within the bounds of reasonableness, and the levels of disaggregation suggested by WorldCom should not be unduly burdensome for incumbent LECs.

Officers' certifications should be adequate to ensure the accuracy of the reported data, given that IXC's and competitive LECs will provide a policing function of sorts. The Commission, however, should reserve for itself auditing opportunities in the event disputes over reporting accuracy arise. Harsh penalties should be levied in the event that reported data proves to be erroneous.

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<sup>20</sup> Letter from Lisa B. Smith, Senior Policy Counsel, WorldCom, Inc., to Magalie Salas, Secretary, Federal Communications Commission, filed in CC Docket NO. 96-98 on August 6, 2001.

Sunsetting of regulatory requirements is, by its nature, arbitrary. Certainly, periodic reviews of the continuing need for special access performance measures and standards should be undertaken by the Commission, with relaxation or elimination of requirements effected when warranted by market conditions. Establishing a date certain for suspension or termination of the measures and standards adopted here or even creating precise triggers for such action, without benefit of perfect foresight, simply cannot be justified.

5. Conclusion

By reason of, and consistent with, the foregoing, the Association of Communications Enterprises hereby urges the Commission to adopt national performance measurements and standards for incumbent LEC provision of special access services.

Respectfully submitted,

**ASSOCIATION OF COMMUNICATIONS  
ENTERPRISES**

By: \_\_\_\_\_/s/ \_\_\_\_\_

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